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No. 80-11 and 80-15

In the

Supreme Court of the United States

October Term, 1979

J. GREGORY MERRION, et al., *Petitioners,*

v.

JICARILLA APACHE TRIBE, et al., *Respondents.*

AMOCO PRODUCTION COMPANY,
and MARATHON OIL COMPANY, *Petitioners,*

v.

JICARILLA APACHE TRIBE, et al., *Respondents.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON ELECTRIC POWER COMPANY, and DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Project Agricultural Improvement and Power District, Arizona Public Service Company, Nevada Power Company, Tucson Electric Power Company, and Department of Water and Power of the City of Los Angeles hereby move for leave to file a Brief of Amici Curiae in support of the petitioners in this case. The proposed brief accompanies this Motion. The amici sought and obtained the consent of the Merrion and Bayless petitioners, the Amoco petitioners, and the Solicitor General of the United States on behalf of the respondent Secretary of the Interior. However, counsel for the Jicarilla Apache Tribe respondent has withheld his consent. Consent to the filing of this brief by the amicus City of Los Angeles was not necessary under Rule 36(4), Rules of the Supreme Court, since it is a political subdivision of the State of California, and the brief is sponsored by the City Attorney. See proposed brief at page 14.

The amici are interested in this case because they own and operate a power plant on the Navajo Indian Reservation and are resisting in separate litigation the imposition of Navajo Tribal taxes. For a more detailed statement, see the following brief at pages 2-3. The amici believe that a discussion of broad policy questions and this Court's opinion in *Washington v. Confederated Tribes of Colville Indian Reservation*, _____ U.S. _____, 100 S. Ct. 2069, 2080-81 (1980) will assist this Court in the proper resolution of one of the questions presented on certiorari. If for any reason this motion is denied, then we ask that this

Court accept for filing the brief which follows on behalf of the City of Los Angeles.

Dated: November 20, 1980.

Respectfully submitted,

JENNINGS, STROUSS & SALMON

By _____
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INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amici curiae are joint tenants in the Navajo Project, a $600,000,000 coal-fired electric generation plant, located near Page, Arizona, on the Navajo Reservation. The amicus Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona. The amicus Department of Water and Power of the City of Los Angeles is a department organized and existing under the charter of the City of Los Angeles, a municipal corporation of the State of California. The amici Arizona Public Service Company and Tucson Electric Power Company are public service corporations organized under Arizona law. The amicus Nevada Power Company is a public service corporation organized under Nevada law. Salt River Project owns 21.7% of the Navajo Project for its own benefit and holds 24.3% for the use and benefit of the United States of America intended for use by the Department of the Interior to meet its power needs for the Central Arizona Project. All amici are non-Indian entities. The United States, with the consent of the Navajo Tribe, granted the amici a right-of-way and easement for the project site and related facilities, and the tribe granted the amici an overlapping lease of the same land with the consent of the Secretary of the Interior.

Shortly after the Navajo Project's completion, the Navajo Tribe of Indians adopted resolutions purporting to tax (1) the Project's emission of sulfur compounds, (2) the Project's leasehold, and (3) the Project's gross receipts.

As a result, the amici are parties to litigation in the United States District Court for the District of Arizona challenging the validity of the tax on sulfur emissions.[1] The amount of this tax escalates to about $50,000,000 a year after five years. The amici's challenge to the leasehold interest tax is presently on appeal in the

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[1] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977).

United States Court of Appeals for the Ninth Circuit.[2] Although the amici's claims against the validity of Navajo tribal taxation as to them are many, a claim common to one in this case is that the dependent status of Indian tribes necessarily precludes their assertion of governmental authority over non-member, non-Indian entities.

Of the many questions presented to this Court on certiorari, these amici will limit their presentation to that portion of the holding below characterized as the "basic question" of an Indian tribe's power to impose a tax on non-members of the tribe doing business on a leasehold granted by the tribe within the boundaries of an Indian Reservation. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541-44 (10th Cir. 1980). We submit that because the tribe has no such governmental power, the other questions presented to this Court need not be decided and the judgment of the United States Court of Appeals for the Tenth Circuit must be reversed.

ARGUMENT

The decision below is plain error. The court confused the rights of an Indian tribe as a landowner, with its limited power of self-government over its own members. By mixing these two concepts, the court reached the conclusion that the tribe's power of self-government extended to non-members. To reach this result, the court refused to attribute significance to this Court's decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978), and *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978). 617 F.2d at 542.

We and others have made the argument against tribal taxation of non-members elsewhere. Brief of Amici Curiae, Salt River Project, et al. in this Court in the case of *Washington v. Confederated Tribes of Colville Indian Reservation*, No. 78-630; *I American Indian Policy Review*

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[2] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. 78-3492 (9th Cir., argued on Nov. 12, 1980, decision pending).

Commission, Final Report 583-96 (1977) (separate views of L. Meeds); *Martone, Of Power and Purpose*, 54 Notre Dame Law. 829 (1979). It is there shown that an Indian tribe is without civil regulatory authority and jurisdiction over non-members and that this Court's decisions in *Oliphant, supra,* and *Wheeler, supra,* permit of no other principled conclusion. It was shown that of all the treaties which addressed the issue, each uniformly excluded tribal civil jurisdiction over non-members. *See, e.g., Martone, supra,* 54 Notre Dame Law. at 837, n. 50. And, it was shown that all the cases relied upon by the Court below in this case, simply do not support tribal governmental power over non-members.

We thus limit our participation here to a general but brief discussion of how tribal taxation of non-members jeopardizes the most fundamental interests of the American body politic. We also discuss this Court's recent remarks in *Washington v. Confederated Tribes of Colville Indian Reservation,* _____ U.S. _____, 100 S.Ct. 2069, 2080-81 (1980).

I. TRIBAL TAXATION OF NON-MEMBERS VIOLATES THE SOCIAL CONTRACT AND, IF PERMITTED, WOULD BE THE ONLY SOURCE OF GOVERNMENTAL POWER WITHIN THESE UNITED STATES WHICH COULD BE EXERCISED WITHOUT LAWFUL RESTRAINT.

Since the ratification of the United States Constitution, the American social contract has been between its citizens, the United States, and the several states. Thus, at least within the boundaries of the United States, Americans have consented to state and federal governmental power over their liberty and their property. Because of the obvious potential for abuse the American people insisted upon two fundamental principles. First, government would be controlled by the people through the democratic process. A second and equally important principle was that the exer-

cise of federal and state governmental power would be subject to certain constitutional limitations. This Court's major work has been to resolve disputes in which these two important interests are at stake.

Tribal taxation of non-members does violence to both principles. Non-members have never consented to government by Indian tribes, and, in this country at least, "each sovereign governs only with the consent of the governed". *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 1191 (1979). Non-members of the tribe by definition cannot participate in the exercise of tribal governmental power. Unlike the states in the United States, the tribe purports not only to be a government, but is the owner of communal property in which only its members share an interest. The assertion of governmental power by Indian tribes over their own members creates no problem since members participate in tribal governmental power and have an interest in tribal communal assets. Moreover, they have consented to tribal government through their own social contract with the tribe. This can hardly be said of non-members.

This is profoundly important. The normal democratic political control over the exercise of governmental power is absent when an Indian tribe seeks to assert governmental power over non-members. Thus, an Indian tribe has no incentive to exercise governmental power over non-members with justice or wisdom. For example, the Navajo taxes attacked by amici are applicable only to non-Navajos. This should come as no surprise since the human ability to exercise governmental power unjustly was the very basis for the creation of lawful restraint on that power under our federal constitutional scheme.

This leads us to the second hallmark of the American body politic. In our scheme, the exercise of federal and state governmental power is constrained not only by the implicit political checks of democratic control of power, but also by external constraints contained in our organic law. The United States Constitution constrains the governmen-

tal power of the United States and the states, and the state constitutions further constrain the powers of the states. Ever since *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986 (1896), this Court has held that the limitations imposed upon the United States by the Bill of Rights do not operate to limit the exercise of tribal governmental power over its own members. *See, United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978). Nor does federal or state jurisdiction exist to entertain claims brought by Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, seeking to enforce statutory restraints on the exercise of tribal power. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978). While this state of the law may not upset a tribal member's expectations of external restraint on the control of tribal governmental power, it certainly collides with the non-members' expectations of the sanctity of civil liberties under our constitutional scheme. It begs the question to suggest that a non-member pursue his federal claims through a tribal forum. The tribe is the very agency whose conduct is attacked. Separation of powers is a concept foreign to tribal government. Moreover, there is no state or federal court judicial review of a tribal forum's adjudication of federal rights under the Indian Civil Rights Act. Thus, the determination of substantial *federal* rights would not be subject to judicial review by an Article III federal court, including this one. This would mean that for a non-member the Act is a nullity.

Thus, for this Court to uphold tribal taxation of non-members on an Indian Reservation, it would have to conclude that there is within the United States of America governmental power which is neither subject to democratic control, nor external lawful restraint. This does violence to the most fundamental assumptions Americans share about the exercise of governmental power within the United States.

These principles are at stake in the case before this Court. For unlike the cigarette purchasers in *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* the petitioners here are lawfully present on the reservation under lease with the tribe. As a landowner, the tribe has set the conditions of entry and has memorialized them in the lease between the parties. That these principles are not mere abstractions can best be shown by a comparison of their interests with those of the non-Indians in *Colville, supra.*

II. THIS CASE IS NOT *COLVILLE*

A. Colville Is A "Condition of Entry" Case, And Has No Application To Those For Whom The Conditions Of Entry Have Already Been Set.

In *Colville, supra,* this Court held that a state could require a tribe to add a state's tax to cigarettes sold by the tribe to non-members even where the tribe added its own tax to the transaction. In reaching this result this Court commented on tribal taxation very generally. 100 S.Ct. at 2080-81. But *Colville* was a pure condition of entry case, and in no way supports tribal governmental power over non-members.

The choice of the non-member was clear. A typical commercial transaction, he could either buy the cigarettes at the price the tribe chose to sell them, including the tribal tax, or he could buy his cigarettes elsewhere. 100 S.Ct. at 2083. The tribe was a party to the transaction and the tax was of the sort that could never be enforced for non-payment in tribal court or elsewhere because the payment of the tax was the condition precedent to the sale of cigarettes. Thus, the transaction in the *Colville* case involved a tax only in the broadest sense in which that word is used. No sanctions were or could have been involved, and no prior dealings with the tribe were implicated. It was a pure condition precedent to a sale case, akin to the condition of entry cases discussed at length in Martone, *supra,* 54 Notre Dame Law. 838-42. Indeed, the authority upon which this

Court relied involved the tribe's power to condition entry on the payment of a fee, the failure of which resulted in the single sanction of exclusion or removal from the reservation. This concept is best summed up by the solicitor's opinion cited by this Court in *Colville:*

> Except where Congress has provided otherwise, this power [of taxation] may be exercised over members of the tribe *and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.* 100 S.Ct. at 2081, citing *Powers of Indian Tribes,* 55 I.D. 14, 46 (1934). (Some emphasis the Court's, some emphasis added).

Note that that portion of the statement relating to members of the tribe is phrased in absolute language while that portion of the statement relating to nonmembers includes the attachment of condition of entry language.

Similarly, this Court in *Colville* characterized cases acknowledging the tribal power to tax as involving "non-Indians *entering* the reservation to engage in economic activity." 100 S.Ct. at 2081 (emphasis added). The Court said no federal statute cited to it showed any congressional departure from this view. Yet we have examined every Indian treaty and have found that all treaties which secure the right of self-government to Indian tribes, including civil power over persons and property, exclude jurisdiction over persons (and their property) who are not by birth, adoption or otherwise citizens or members of the tribe. Treaty with the Cherokee, art. 5, 7 Stat. 478 (1835); Treaty with the Choctaw and Chickasaw, art. 7, 11 Stat. 611 (1855); Treaty with the Creeks, art. 15, 11 Stat. 699 (1856); Treaty with the Seminole, art. 2, 14 Stat. 755 (1866).[3] Cf. Treaty with the Chickasaw art. III, 7 Stat. 450 (1834); Treaty with the Comanche, et al., art. 2, 9 Stat. 844 (1846); Treaty with the Navajo, arts. VI, IX, 9 Stat. 974 (1849). As to treaties with

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[3] The relevant articles of these four treaties are reproduced in the Appendix to this brief.

tribes in the Indian Territory (Oklahoma), e.g., Treaty with the Choctaw and Chickasaw, 14 Stat. 769 (1866), and Treaty with the Cherokee, 14 Stat. 799 (1866) see *Ex parte Mayfield*, 141 U.S. 107, 11 S.Ct. 939, 941 (1891). The scheme in the Indian Territory vested civil jurisdiction in tribal courts over actions in which only Indians were parties. Any action to which a non-member was a party was to be brought in federal court. *Id.* at 941. Act of May 2, 1890, §§ 30, 31, 26 Stat. 81, 94. *Alberty v. United States*, 162 U.S. 499, 503, 16 S.Ct. 864 (1896). See generally F. Cohen, *Federal Indian Law* 382 (U.N.M. ed. 1942). There could be no better proof of the shared understanding of the executive and the congressional branches than these treaty and statutory provisions.

Thus it is clear that the tribal power to tax acknowledged in *Colville* was based upon the proprietary power to exclude or condition entry—a power these treaties and statutes acknowledge.[4]

But what of non-members, as those here, whose "conditions" with respect to their "entering the reservation" have already been established by lease? The *Colville* dicta does not support taxation in such instances. Indeed, the only inference to be drawn from the *Colville* dicta and its emphasis on conditions of entry is a negative one. For example, in stating that the power of the tribe to add its tax to the sale of cigarettes was not divested by virtue of the tribe's dependent status, this Court noted that such a divestiture occurs in cases where the exercise of tribal governmental power is inconsistent with the overriding interests of the national government, 100 S.Ct. at 2081, and gave as an illustration the prosecution of non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. *Id.* This Court noted that "[i]n the present case" it saw no overriding federal interest that would necessarily be frustrated by tribal taxation. *Id.* This was so

[4] Of course, where, as here, the conditions have been set, they cannot be unilaterally changed or else the lease would not be a lease.

because the tax in *Colville* was not a true tax at all. The interests of non-Indians could never have been implicated in tribal proceedings either administrative or judicial "which do not accord the full protections of the Bill of Rights". *Id.* The non-member's interests in the democratic control of governmental power and in constitutional limitations on its exercise were not implicated.

The case before this court is far different from that in *Colville.* Here, the conditions of entry have been set and are clearly delineated in the lease. Moreover, the petitioners do not have the freedom to choose not to "buy the cigarettes". They have federal rights to be on the reservation and cannot be asked to "possibly travel elsewhere". *Colville,* 100 S.Ct. at 2083. The tax in this case purports to subject the petitioners to tribal processes "which do not accord the full protection of the Bill of Rights". *Id.* at 2081. It would be a curious perversion of *Colville* to permit the very result which this Court used to illustrate those instances in which the tribe's dependent status has resulted in a divestiture of tribal power. Here, the non-members' interests in democratic control of governmental power and constitutional limitations are highly implicated.

In *Colville,* this Court recognized that the relevant treaties involved could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter; but purchasers entering the reservation are not the State's agents and any *agreements* which they might make cannot bind it." 100 S. Ct. at 2082 (emphasis added). Thus, it is clear that this Court upheld the tribal power to add its tax to the sale of cigarettes because the tribe could exclude those non-Indian purchasers or impose conditions on their entry. It regarded the non-Indian's purchase of cigarettes as an "agreement" to pay the tax. But here, the petitioners did not agree to pay the tax nor can they be excluded from their leasehold which sets forth the

very conditions imposed by the tribe for their initial entry. Thus we submit that the *Colville* dicta does not support tribal governmental power over non-members of the sort asserted here.

To summarize, *Colville* was a condition of entry case. Its dicta is not applicable here because if applied, the very evils this Court noted were absent in *Colville* would result here. But, even if one would attribute to the *Colville* dicta a broadness of application not warranted by its facts, the tribe has no "significant interest in the subject matter" to tax the activities of the petitioners, and there is here an "overriding federal interest that would necessarily be frustrated by tribal taxation." 100 S.Ct. at 2081. It is to this second argument that we next turn.

B. The Tribe Has No Significant Interest In The Leasehold, and Even If It Did, There Is An Overriding Federal Interest That Would Be Frustrated By the Tribal Tax

The *Colville* dicta is most general. This Court said that the *general* power to "tax" transactions on reservations significantly involving a tribe is not divested "by federal law or necessary implication of their dependent status". 100 S.Ct. at 2081. That general power was held not to be completely ousted there because the cigarette tax was not "inconsistent with the overriding interests of the National Government." *Id.*

Thus, even reading *Colville* most expansively the question remains whether, in any specific context, tribal taxation of non-members *is* divested by (1) its lack of significant interest in the subject matter or (2) by specific federal law, either by the letter of federal law or because the tribal taxation would be "inconsistent with the overriding interests of the National Government." *Id.*

(1) *The Tribe Has No Significant Intertest.*

Absent an overriding federal interest, the *Colville* dicta authorizes tribal taxation of transactions or activities on trust lands in which the tribe has a significant interest. *Col-*

ville, 100 S. Ct. at 2081. Yet here the tribe's interest in the land has been extinguished by the lease for the duration of its term. Hence, the tribe's interest in the leasehold is insufficiently significant to justify the tax even under the *Colville* dicta's most expansive interpretation.

(2) *The Tribal Power is Ousted by an Overriding Federal Interest.*

Even assuming the tribe somehow had a significant interest in a leasehold which extinguishes its interest, tribal power to tax is ousted by the overriding federal interest in federal control of leases of lands to which it holds the fee.

It is apparent that the Jicarilla tax would impermissibly disrupt federal laws, interests, and policies. Specifically, the federal interest embodied in the Indian land leasing statutes and regulations is an "overriding federal interest that would necessarily be frustrated by tribal taxation" on the leasehold granted under the federal statutes and regulations.

The petitioners are on the reservation under a comprehensive federal statutory and regulatory scheme which leaves no room for tribal taxation. We leave the substance of this argument to the petitioners, but mention that the treatment of this issue by the court below is unpersuasive in the extreme. *See, Merrion V. Jicarilla Apache Tribe*, 617 F.2d 537, 548-49 (10th Cir. 1980).

The Jicarilla tax at issue in this case is nothing more than an attempt to unilaterally raise the rents or other compensation required under the leases previously negotiated and consummated under federal authority. Gas and oil taken by the tribe is exempt from taxation. This attempt by the tribe to unilaterally revoke the agreed upon and federally approved consideration for reservation leases is plainly violative of the "overriding federal interest" in determining and regulating the compensation to be exacted from reservation lessees.

This plain and literal conflict between, on the one hand, the tribe's unilateral attempts to change the economics of federal leases and, on the other, the exclusive federal administrative responsibility for fixing the consideration for such leases at the outset threatens in a general way the federal policy of inducing on-reservation investment. As in any other business activity, it is essential in order to induce investment that the investor have some reasonable notion of his costs. Tribal taxation of federal leases destroys totally the bargained for rent and the certainty of an investor's liability for his lease on the reservation. Instead, he is placed in a position where, after having invested substantial resources in fixed assets on the reservation, he is at the mercy of the tribe's unilateral decision to raise the rent for the lease to whatever extent the tribe chooses.

Obviously, this result, if allowed, would totally frustrate the federal policy of inducing investment on Indian reservations through the leasing statutes. No rational investor would enter into such an arrangement. There is no possibility of participating as a citizen in the deliberative processes leading to a decision to tax. There are no constitutional limits on the exercise of tribal power. There is no federal judicial review of federal questions which might be heard or determined before tribal courts. In short, he would be subjected to unbridled lawlessness of the sort long thought impossible within these United States.

III. CONCLUSION

Many non-Indians live on Indian reservations and others do business there. The assertion of tribal governmental power over them violates the social contract, does violence to the notion of democratic control over governmental power and subjects such persons to the deprivation of fundamental rights in ways not possible if the power itself were subject to constitiutional limitation. Federal rights could be lost or adjudicated in tribal forums with no possibility of federal or state judicial review.

The tribe is a government for its members. As to non-members it is a mere landowner. As such, the tribe can achieve its legitimate economic objectives by contract with non-members. If the non-member is willing to meet the tribe's terms, the tribe's economic objectives are by definition satisfied. There is thus no compelling policy reason to sacrifice the civil liberties interests of non-members on the altar of tribal taxation. The judgment of the United States Court of Appeals for the Tenth Circuit must be reversed.

Respectfully submitted,

November, 1980

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CERTIFICATE OF SERVICE

I, Frederick J. Martone, one of the attorneys for the amici curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing motion and brief; specifically, that on November 20, 1980, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing motion and brief of amici curiae addressed to each of the following:

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TREATY WITH THE CHOCTAW AND CHICKASAW, 1855.

ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe,* and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, *without becoming citizens or members of either of said tribes.* (emphasis added).

TREATY WITH THE CREEKS, ETC., 1856

ARTICLE 15. So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; *excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe;* and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits *without becoming members of either of said tribes.* (emphasis added).

TREATY WITH THE SEMINOLE, 1866.

ARTICLE 2. The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, *who may be adopted as citizens or members of said tribe.* (emphasis added).

TREATY WITH THE CHEROKEE, 1835

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; *and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (emphasis added).